Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

outweighs the practice of the United States in observing the rules for many years (page 30). Indeed Mr. Roxburgh's statement on page 95 should be read in connection with this section: "When a state in adopting a new practice makes an express proviso that it does so from motives of convenience or courtesy, this proviso will for a certain time prevent the growth of a conviction of legal duty; but if the practice is continued, and the proviso is not renewed, after lapse of time the proviso will cease to be effective, and a customary rule will grow up."

Mr. Roxburgh in maintaining that if "the treaty infringes the legal rights of a third state, that state is immediately entitled to intervene" (page 32), seems to go further than Professor Oppenheim would sanction, unless the word "intervene" be regarded as equivalent to "take action to maintain a right," or unless there be some *act* by one of the parties to the treaty constituting an actual violation of the right of the third state. Some of the cases mentioned as grounds for intervention seem to be just grounds for action to maintain a right, or even for retaliation, while hardly grounds for intervention in the technical sense.

In the chapter on treaties beneficial to third states there seems to be a tendency to give the policy of neutralization when embodied in treaty a legal standing, even for parties who have not signed the treaties.

Speaking of the Hay-Pauncefote treaty in regard to the Panama Canal, the author says that "it is very probable that in the course of time this treaty will become the basis of a rule of customary international law," even though now under this treaty between two states and under the principle *pacta tertiis nec nocent nec prosunt*, no rights may have accrued to third states.

In order to make the attitude of the United States clear in regard to the Declaration of Paris, it would be necessary to add on page 93 that the President on April 26, 1898, declared that the United States would "adhere to the rules of the Declaration of Paris."

There would be a considerable difference of opinion on the view which Mr. Roxburgh seems to support that a lease of territory by one state to another implies a change in sovereignty which must be recognized by a third state. His contention that the owner of a servitude enjoys a right *in rem*, however, shows the recent tendency.

There is throughout, as always in the use of an analogy, danger in pressing it too far. In using the analogy of treaties and contracts it should be shown that both bind the states parties to them, but that treaties in addition may partake of the nature of legislation as viewed from the obligation of nationals of the states. Legal rights and obligations having treaty sources often give rise to international difficulties through conflict of law. In this brief treatment the field of war and neutrality has scarcely been touched. Nevertheless it is fair to say that whether or not the conclusions of the book are accepted, it is entitled to a place in the series "Contributions to International Law and Diplomacy."

G. G. WILSON.

ROMAN LAW IN THE MODERN WORLD. By Charles Phineas Sherman. Three Volumes. Boston: The Boston Book Company, 1917. Volume I, History of Roman Law and its descent in English, French, German, Italian, Spanish, and other Modern Law, pp. xxvii, 413. Volume II, Manual of Roman Law illustrated by Anglo-American Law and Modern Codes, pp. xxxii, 496. Volume III, Subject Guides to the Texts of Roman Law, to Modern Codes and Legal Literature; Index to Volumes I–III, pp. 315.

A book is in part, at least, to be measured by its own measure. This work, by one who has for years been a teacher of Roman law, in a school that has been

for many years . . . "a light shining in gross darkness," which is written "for the general reader, the non-professional student, the law student and the law teacher" must be taken seriously and held to a high standard. The first volume, which contains four hundred and thirteen pages, attempts to cover the field of Roman law from its possible origin in Babylon through the monarchy, the early and later republics, the early and later empires, the period of debased popular Roman law, and the modern period following the reception of the Justinian compilation of Roman law in Western Europe. It attempts to give a list of the great Roman jurists and the contribution of each to the law; a list of the great writers and thinkers who worked over the pure Roman law as studied in Western Europe or who attempted to apply its principles to the life that they found about them, together with a statement of the place of each in the history of law; to give a list of the law schools in which Roman law has ever been taught; and to give a detailed account of the history of Roman law in each of the modern states in which it is in any way in force. No matter how well it might be executed, an attempt to compress this mass of information into so small a space must, at best, result in a treatment of the subject in outline, filled in with a list of dates and a few facts under each topic heading. Under such a treatment we have no presentation of the real growth of the Roman law from an historical point of view, no study of its internal development, no idea of its constant striving, while its vitality lasted, to adapt itself to the ever-changing needs of a society that gradually turned from a country town into a world empire, and no discussion of the constant struggle which is apparently just reaching its climax, to adapt the principles of the Roman law to the changed conditions of modern life.

The second volume, which contains four hundred and ninety-six pages, is a manual of Roman law which attempts to set forth "the principles of the Civil law, more especially private law, arranged systematically in the order of a code and illustrated as to their survival from Anglo-American law and the modern Code as copiously as space will permit." The code whose order is taken as a model is the French Civil Code. Now, the French Civil Code was a wonderful piece of work. Under high pressure a working system of law was produced which combined the mass of popular Roman law, Frankish and Norman customary law, pure Roman law, the writings of the French jurists and the Royal ordonnances, into a workable system, and which gave a much-needed uniformity, while it preserved much of the spirit of the old law. But its order has never been regarded as its chief merit, but rather as its great blemish. The clarity of thought, the simplicity of style, and the grasp of essential principles have made the French code great in spite of its order. It is unfortunate that this particular order was selected. One of the immediate results of this selection has been that the great contribution of Roman law to juristic thought — the legal transaction, the juristic act, the act in law — is treated as a topic of minor importance and is placed under obligations *ex contractu*. To this great subject is given but a little over a page — a little more than is devoted to a discussion of ***res sacrae***, ***res religiosae*** and ***res sanctae*** — a fifth of one per cent of the entire manual.

The third volume of three hundred and fifteen pages is made up of "Subject-guides to the texts of Roman law, to the modern codes and legal literature," a bibliography of Roman law and an index.

The evolution of the law of Rome from the archaic law of a little city-state through the different stages of legal development, up to its ultimate perfection as the world law of a mighty empire is, in one sense, a unique phenomenon. To work out such a law a nation must possess a genius for law and for government. It must have such a geographical position, and it must be so favored by the course of history that it is able to build up and maintain the framework of an efficient administration, and to keep hostile powers at bay on its frontiers

by its armies, and to hold the sea by its navies so that its law can develop without external interferences. Unless these elements coexist its law will be crushed out by the brute force of the physical invader and destroyer on the one hand; or on the other, it will be crushed out by the impact of legal ideas and institutions so far superior to its own that the native product succumbs before the intellectual power of the spiritual invader and destroyer. Only one race besides the Roman has been able to develop its own law, and that is the English. Many kingdoms and empires have flourished and conquered in a material sense for long periods of time; and some, indeed, have endured down to this day, without the ability to develop a native system of law which could resist the alien invisible invader that cannot be stopped by moat or castle, by trench or barrage fire. In France and Germany alike, there was a mass of primitive custom, much like that of England, which in the hands of a race of native legal genius might have developed into a complete and perfected system of law. Neither country possessed that genius. Without lawyers or judges who were technically trained in the native law administered by law tribunals, it remained in a condition of arrested development, while the world grew away from primitive conditions into mediæval; and finally as modern progress began, it yielded the field, vanquished by the law of conquered Rome.

In another sense, therefore, the evolution of Roman law is not unique, and it cannot be understood if it is looked upon as unique. Many of the peculiarities of its development which seem to be most characteristically Roman, when considered without reference to any other system, appear in their true light as universal when considered with reference to the development of other systems. There have been other powers, principalities, and empires besides those of the Roman and the Anglo-American. In many of the Aryan or Semitic peoples we find a development of archaic law which can well be placed by the side of the Twelve Tables. The Code of Hammurabi, compiled eighteen centuries before the Twelve Tables, formed a summing up of the juristic development of Babylon up to that time which, in the hands of a race of legal genius, favored by military success and by continuity of government, might well have served as a starting point for a development of law equal to that of Rome itself. The inability of any one of the states of Babylonia to secure that permanent preponderance which was necessary, in the absence of any ability on their part to cooperate, to secure peace and order, makes its internal history one of civil war, revolution, and counter revolution with a kaleidoscope shifting of political power; and its external history that of one who alternately is conqueror and conquered. Hammurabi's code is therefore not an example of an early step in the evolution of a perfected system of law, but only a case of arrested development, — one out of many. If the Gauls had possessed political capacity equal to their bravery and dash as warriors, if the populace of Carthage had had even a fraction of the spirit of the Barca, or if the Mongol had begun his western raids four hundred years earlier, Roman law, too, might be classed as a case of arrested development.

As each society develops it passes through much the same phases, and life propounds to law much the same problems. If any other society, such as England, were given an opportunity to go through all the stages of development that Rome underwent, the same problems that troubled Roman law would be submitted to it. The fact that Anglo-American law has attempted to solve many of the problems that perplexed Roman law does not in the least prove a conscious or deliberate borrowing or an unconscious influence; nor does the fact that many of the solutions given to similar problems are much the same, prove this. Even if there were no conscious borrowing and no subconscious influence, many of these problems would be solved in much the same manner by each law to which it was submitted. Rome and England alike were Aryan, building on a common foundation of Aryan tradition, having from the first

many common ideas as to the family, property, and social organization. Indeed the wonder is that with so much common tradition and with such temptation on the part of the common law while in its formative period to borrow from the Roman law as a beginning student may sometimes copy from one who is more advanced, the common law kept so aloof, borrowed so little, and regarded the Roman law rather as an example to be rivaled or surpassed by independent endeavor, than as a repository of learning to be copied blindly.

There is one feature in the development of Roman law that is absolutely unique, and that is what Vinogradoff calls the ghost story of the Roman law, — the second life of the Roman law after the death of the body in which it first saw the light. At its resurrection after its long sleep it found a world that lacked historic sense or knowledge and that was ready to yield blind obedience to the written word, — a world that assumed the absolute authority of the Justinian compilations of the law without knowing or caring about the actual growth and origin of the rules and principles contained in the Digest, and which adopted as the first article of its faith the theory that there were no omissions in the Justinian law, that it covered all cases present, past, and future, that it was all-sufficient for another race under a different social organization, and that the only task of the judge was the application of formal dialectic logic as a means of deducing the intention of the legislator from the rules of the statute. But theory cannot change fact, though it may blind our eyes to it. The reception of Roman law was not a reception of Roman life. Western Europe adopted Roman rules of decision. It could not adopt Roman legal relations. The result has been that the same formula which Justinian reënacted is repeated literally, and is thereupon given a different meaning, by its application to a different legal relation. This new legal relation is usually the closest analogy to the Roman legal relation that could be discovered. Sometimes the analogy is very close and sometimes very remote. In either case the Roman name is used and the Roman formula is repeated with the implicit belief that the law must therefore be the same.

In Professor Sherman's manual everything is drawn on a flat background. Historical perspective is lacking. The *jus civile*, the prætor's edict, the writings of the Roman jurists and the imperial constitutions, the writings of the French and German jurists, the modern codes based on the civil law and the Anglo-American law are combined in a mosaic, without regard to time, place, or legal system. This is in part due to the fact that the history of the Roman law which is found in volume one is external, without regard to internal development or history of doctrine, and that volume two presents the analytical side without much regard to historical development. Dates are given, occasionally, it is true, but the book does not bring before us the gradual development of Roman law to meet new social conditions or to respond to the spiritual effect of new ideas. Legal ideas of the common law which resemble those of Roman law are assumed to be the result of deliberate and often of dishonest and unacknowledged borrowing. In fact, this is one of the presuppositions which our author makes of all law, — that whatever resemblance is found, whether in arrangement, doctrine, or result, is due to copying. Assuming this presupposition to be true, the author's classification of England and the United States as civil-law countries is not unnatural. The common-law element is treated as a debasing alloy which prevents these countries from preserving civil law in its purest form. "The Institutes of Justinian are to be best explained as a common source of the fundamental ideas of Anglo-American as well as continental European jurisprudence." An illustration of this tendency of our author is found in the law of the family in Roman law and in Anglo-American law. Each begins in fact with the archaic concept of the family as the legal unit, each runs through its different steps of development, and each concludes with the individualistic theory, in which the idea of the family dissolves into a series of relations

between the various members thereof. Our author, however, regards the Anglo-American law of husband and wife as one of the three most striking illustrations of a reënactment of Roman law in America. Our doctrine of impossibility of performance is treated as identical with the Roman doctrines of *vis major* and *casus fortuitus* and as borrowed directly therefrom. These are examples taken at random. Practically every doctrine of common law or equity to which the most remote analogy can be found in Roman law is treated as a direct and deliberate borrowing from the latter. It may be added that if it is to be assumed that Anglo-American law is a debased form of Roman law, it is but a short step to use the time-honored method of teaching Roman law as proof as strong as holy writ that the case-method of studying common law is fundamentally wrong.

Another presupposition is that Roman law is in most respects the ultimate ideal, the natural law revealed on earth, to which all other law must conform. Only here and there is an exception noted. One of these exceptions is of especial interest. While many of the common-law problems in contract law are problems of universal jurisprudence, which appear in one form or another in every commercial and manufacturing community, the problem of consideration is peculiar to Anglo-American jurisprudence. Every system of law which attempts to enforce any executory informal contracts is puzzled to find a test for determining which to enforce and which to ignore; but only the Anglo-American law has taken consideration as the test; and it is this doctrine of consideration which has seemed to many students of contract law to be the most unfortunate feature of our law. Professor Sherman regards the Roman cause as a partial working out of the doctrine of consideration, — the grub out of which the butterfly of the modern doctrine is to arise. "Modern law has simply completed the evolution of this Roman doctrine by expressly making consideration a requisite for each contract."

The authorities upon which our author relies are many and diverse. Some of them are of value to the student. Ready reference is given to some of the standard French and German works, to specific passages of the Institutes, the Digest, the Code and Gaius, and to specific sections of modern codes. Many of them, on the other hand, are to authorities which of themselves can scarcely be regarded as final. Blackstone is relied upon for the history of the common law; and his admission that any specific doctrine comes from the civil law is regarded as conclusive; Spence is the ultimate authority for the influence of Roman law on Anglo-American law; Robinson for common law and civil law alike, and William's "Institutes of Justinian" for Roman law. In spite of the relatively small amount of English works on Roman law, the bulk of the references other than specific ones to the Institute, Digest, Code, or Gaius are to English works. Some of these are valuable, many are of little or no value; and authorities of great value are omitted altogether.

Fewer are the references to foreign authors, in spite of the enormous bulk of French and German juristic writing. Sins of omission are here more noticeable than sins of commission. For example, the only references under the text on the subject of mistake are to the Institutes, the Digest, Gaius and Robinson's "Elementary Law." Neither the subject guide nor the bibliography gives a hint that Leonhard wrote on mistake. While Bethmann-Hollweg's works on procedure appear in the subject guides and the bibliography, no reference is made to them in the notes to the text on procedure. These examples, selected at random, are characteristic of the annotation of the text. The references, however, are the most valuable portion of the book.

The typographical errors which appear occasionally should not be charged to the author. No one, especially under present conditions, wishes to be held liable for the short-comings of the compositor and the proof reader.

W. H. PAGE.